SUPREME COURT, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CASE NO. 78-1801

THE STATE OF FLORIDA,

Petitioner,

vs.

JACK MULLINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

[redacted]

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I

OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978), D.Ct. Case No. 77-1058, opinion filed December 13, 1977, rehearing denied January 16, 1978. The opinion of the Supreme Court of Florida, reversing the

District Court is reported at Mullins v. State, 366 So.2d 1162 (Fla. 1979), S.Ct. Case No. 53,394, opinion filed December 7, 1978, rehearing denied February 22, 1979. Both the decision of the Supreme Court of Florida and the District Court are appended hereto in conformance with Supreme Court Rule 23. There are no official reports for citation of these decisions.

II

JURISDICTION

On February 22, 1979, the Supreme Court of Florida denied rehearing and entered its mandate herein. On May 23, 1979, this Honorable Court granted the Petitioner's Motion for an Extension of Time to file the Petition herein, for a period up to and including June 2, 1979. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

III

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

IV

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

> of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V

STATEMENT OF THE CASE

The Respondent, Jack B. Mullins, was charged by information with unlawful possession of marijuana. See, Petitioner's Appendix, at A2; A6 [hereinafter all references to the four (4) cases appended hereto will be pagination within the Petitioner's Appendix.]. The Respondent's Motion to Suppress the marijuana in the trial court was denied. See, A2; A6. The Respondent in his Motion to Suppress alleged that the marijuana was obtained through an unreasonable search and seizure in violation of the Fourth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution. See, A2; A6.

The substance of the record before the Supreme Court of Florida and the District Court consists of the

testimony at the Motion to Suppress hearing of Frazer, the arresting officer. A2; A5-A7. A police officer in Dade County for four (4) years, Frazer testified that on November 29, 1976, at about 3:20 A.M., he was in his police cruiser, on routine night patrol in a residential area of Opa Locka near Opa Locka Boulevard and 14th Avenue in Miami, Dade County, Florida. Frazer testified that at about 3:20 A.M. he observed the Respondent on a bicycle moving slowly through the Opa Locka Boulevard residential area. A2; A5-A6. Opa Locka Boulevard is a high crime area in Dade County. For several years, the citizens of Dade County have been plagued by a series of rapes occurring in the early morning hours, where the offender has consistently escaped on a bicycle.

Officer Frazer then apparently pulled near the Respondent and asked the Respondent his name and where he was going. A5-A6. The record is devoid, first of all, of any showing that the Respondent ever responded; that Respondent refused to respond, or that Respondent did anything other than carry on a voluntary conversation and secondly, why, how or even where, Officer Frazer or the Respondent stopped their respective vehicles. See, A2; A5-A6. At that point, without any indication that the Respondent ever replied Frazer testified, that based upon his experience, he smelled an odor of marijuana about the Respondent and also observed a clear plastic bag which contained marijuana, protruding from the Respondent's shirt pocket. At that point, Officer Frazer testified that he left his vehicle and placed Petitioner

under arrest for possession of marijuana. See, A2; A6.

The sole question presented to the state courts, in the opinions appended hereto, at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978) [A1-A3] and Mullins v. State, 366 So.2d 1162 (Fla. 1978) [A4-A11], was stated by the Respondent to wit:

> "WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION."

Upon the foregoing facts, the District Court of Appeal of Florida, Third District, rejected the Respondent's contention of error, holding that:

"We hold that no unreasonable search appears in this record and that the fact that the police officer stopped the appellant to speak to him, under the circumstances of this case, was not an infringement of defendant's Fourth or Fourteenth Amendment rights. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); and Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). See also Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); and cf. U.S. v. Allen, 472 F. 2d 145 (5th Cir. 1973)."

A3.

The District Court rejected the construction of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), urged by the Respondent relying upon Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976) [A20-A26 attached hereto]. See, A3.

The Supreme Court of Florida accepted jurisdiction upon the Respondent's Petition for a Writ of Certiorari pursuant to Rule 9.030(a)(2)(A)(iii) Florida Rules of Appellate Procedure (1978), based upon the conflict between the Third District Court's opinion in Mullins v. State and Vollmer v. State, supra. A5. The Supreme Court of Florida adopted the contrary construction of Terry v. Ohio, announced in Vollmer v. State, supra, [A23-A24] and the application of the Fourth and Fourteenth Amendments in Coladonato v. State, 348 So. 2d 326 (Fla. 1977) [A12-A19]. A6. The Court reversed the Third District Court of Appeal and rejected the opinions of Justices Harlan and White to the contrary in Terry v. Ohio, 392 U.S. at pp. 32-34, holding that under the provisions of the Fourth

and Fourteenth Amendments, that a police officer is never authorized to approach and talk to an individual on the public street unless the police officer can articulate a basis for a belief that a crime had, will be, or is currently being committed. See, A6-A11.

VI

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial court below found that the threshhold contact between the arresting officer, Frazer and the Petitioner was "reasonable." Record-on-Appeal at 15. The Florida District Court of Appeal affirmed the trial court, finding no constitutional significance to the issue of either the arrest of the Respondent stemming from the Respondent's possession of marijuana

"in plain view," or the momentary voluntary contact between the Respondent and Officer Frazer preceding the arrest. A3. The Florida Supreme Court reversed both the trier of fact and the Florida Third District of Appeal based upon an erroneous view of the constitutional protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution and has abrogated common sense and the practical exigencies of law enforcement in an urban area. See, Adams v. Williams, 407 U.S. 143, at 145-146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The Petitioner submits that application of the requirements of the Fourth and Fourteenth Amendments in Mullins v. State, 366 So.2d 1162 (Fla. 1979) [A4-A11] is clearly erroneous and follows an errant

line of decisions in Coladanato v. State, 348 So.2d 326 (Fla. 1977) [A12-A19] and Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976) [A20-A26].

The Petitioner submits that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and Fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. Under Terry v. Ohio, supra, and its progeny, a police officer may approach a citizen for three separate reasons: 1) arrest, 2) stop and investigation and 3) mere contact. See, e.g., United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977); Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); People v. DeBour, 386 N.Y.S. 2d

375 (N.Y. App. 1976); see, also, Florida Law Enforcement Handbook, 1978, Dade County Public Safety Department. (Miami, Florida 1978), [A27-A31]. The predicate for each of these categories is different; as are the consequences. In order to justify an arrest, there must exist probable cause to believe that a crime has been committed and that the defendant committed it. In order to justify a stop and detention, the police must be able to articulate an objective, reasonable basis for belief that a crime has been, will be, or is currently being committed. Terry v. Ohio, supra. Such a stop gives the police the power to detain a citizen against his will for the limited purpose of investigation. The third form of approach, a mere contact, is directly applicable in the case at bar, and consists of simple common sense. See, Terry v. Ohio,

United States v. Wylie; Wigfall v. State and People v. DeBour, supra. In a mere contact the officer may not detain a citizen at all. He has only a common right to engage in voluntary conversation and if the citizen does not wish to respond, he need not, and may simply walk away. See, e.g., United States v. Wylie, supra, at p. 67. This natural, common sense conclusion is predicated upon the fact that ordinary threshhold discourse between police officers and citizens on the street is not cause for constitutional alarm. Terry v. Ohio, supra.

In Terry v. Ohio, the court, through Justice Warren, stated the applicable standards herein thus:

> "It does not follow that because an officer may lawfully arrest a person only when he is apprised

> of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusion short of arrest."

392 U.S., supra, at 26.

The court in Terry recognized that for the purpose of the Fourth Amendment, an "arrest and search" and a "stop" are to be considered "seizures." However, the court recognized that:

> "[N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the Officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."

392 U.S., supra, at 19, n.16.

Mr. Justice Harlan in his concurring opinion specifically recognized that the right of a police officer to address questions to other persons is a right possessed by every citizen, co-existing with the equal right of the person addressed to ignore his interrogator and walk away. 392 U.S., supra, at 32,33. Further, in the concurring opinion of Mr. Justice White, it is stated:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."

392 U.S., supra, at 34.

In the case at bar, consistent with the mandate of Terry v. Ohio, supra, there is no testimony that the Respondent did anything other than to voluntarily cooperate with the officer and voluntarily provide

the requested identification. Nor is there any testimony that the Respondent expressed a desire to refuse to cooperate and go on his way. There is no constitutional impact created by a police officer addressing questions to a person on the street at 3:20 o'clock A.M. in a residential area. Terry v. Ohio, supra. Officer Frazer's initial encounter with the Respondent was not an invasion of his constitutional rights.

In Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975), the court recognized and pplied the mere contact rule noted in Terry and Wylie, supra, stating that:

> "it is also our view that the reasonableness of the search and seizure after arrest was not affected by the fact that the original stopping of

> appellant may have been without probable cause. There is no testimony that appellant did anything other than to voluntarily cooperate with officer Leizze and voluntarily provide the requested identification. State v. Foust, Fla.App. 1972, 262 So.2d 686, and see State v. Ecker, Fla. 1975, 311 So.2d 104, and City of Miami v. Aronovitz, Fla. 1959, 114 So.2d 104, 784. Officer Leizze's initial encounter of appellant was not an unlawful invasion of his constitutional rights."

323 So.2d, supra, at 590.

The district court herein applied Terry and Wigfall, supra, to uphold the conviction below. A3. In United States v. Wylie, supra, the court firmly articulated the mere contact rule announced in Terry v. Ohio, supra. The Wylie court relied upon

the actual departmental regulations by which the officer had approached and then finally arrested the defendant, noting that:

> "The Metropolitan Police Department's regulations governing investigative procedures recognize this distinction between mere 'contacts' which are not subject to Fourth Amendment limitations, and investigative 'stops,' which must be supported by a reasonable suspicion. Metropolitan Police Department General Order No. 304-10 (effective July 1, 1973); see note 2 supra. A 'contact' is defined as '[c]onduct by an officer which places him in face-to-face communication with an individual under circumstances in which the individual is free to leave if he wishes,' whereas a 'stop' is described as follows:
>
> > A 'stop' is the temporary detention of a person for the purpose of determining whether probable cause exists to arrest that person. A stop occurs whenever an officer uses his authority to compel a person to halt, or to keep him in a certain place, or to require him to perform some act. . . If a person is under a reasonable impression that he is not free to leave the officer's presence, a 'stop' has occurred." [Emphasis added].

569 F.2d, supra, at 69.

The court concluded that:

> "As the police regulations concede, see note 4 supra, there can be no question that a 'stop' has occurred where physical force has been used to detain a person against his will, or the individual has been subjected to a 'frisk' for weapons. See Terry

v. Ohio, supra, 392 U.S. at 16-17, 19, 88 S.Ct. 1868. The difficulty comes in distinquishing between 'non-forcible stops.' i.e., stops effectuated through a show of authority without the use of force, and mere 'contacts.' In such situations, the crucial consideration is the one set forth in the police definition quoted above: whether the person was 'under a reasonable impression that he [was] not free to leave the officer's presence.' We would only add that in determining whether such a reasonable impression existed, the test must be 'what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.' Coates v. United States, supra, 134 U.S.App.D.C. at 99, 413 F.2d at 373, quoting United States v. McKethan, 247 F.Supp. 324 (D.D.C. 1965), aff'd by order, No. 20,059 (D.C.Cir. 1966)." [Emphasis added].

569 F.2d, supra, at 69-70.

The right of a mere contact is firmly established for the policeman on routine patrol. Officer Frazer herein is a sheriff's officer with the Dade County Public Safety Department. The Florida Law Enforcement Handbook 1978, in a manner similar to Wylie, supra, proscribes legal lines for effective law enforcement and specifically provides for the concept of a mere contact. A29-A31 (Chart 2). A mere contact under the Dade County Sheriff's regulations is for purposes of information only; the justification is none, to mere suspicion; detention permitted is "none;" the force justified is "none" and the officer may request, but not demand identification. A30-A31 (Chart 2).

In the case at bar, Officer Frazer saw the Petitioner slowly riding a bicycle

in a residential area at 3:20 A.M. The area was dark and people were in their homes asleep. Record-on-Appeal at 14. He approached the Petitioner to ask him his name and where he was going because of the hour and location, as well as the Petitioner's slow rate of speed. Record-on-Appeal at 9. It is common knowledge that the area where the Petitioner was aimlessly riding, is a high crime area. It is also well known that for several years the citizens of Dade County have been subject to early morning rapes where the perpetrator has escaped each time on a bicycle. There is no showing in the record of any reaction from the Petitioner except voluntary conversation. Sufficient subjective facts existed due to the neighborhood and the hour of night to arouse at least a minimal suspicion to

"justify" a mere contact. Indeed, Officer Frazer's actions were particularly proper in the performance of his duty to protect the well-being and tranquility of his community. See, Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). In Adams v. Williams, supra, the court restated the rule under Terry v. Ohio, supra, to wit:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. See id., at 23, 88 S.Ct., at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be

> most reasonable in light of the facts known to the officer at the time. [citations omitted]."

407 U.S., supra, at 145-146.

In determining the reasonableness of Officer Frazer's mere contact with Petitioner there must be a balance between the community's interest in law enforcement and the interests of the individual. Terry v. Ohio, supra. Certainly the people of Dade County, Florida, sleeping in their homes at 3:20 A.M. and aware of even the presence of the Respondent under cover of night, would be glad that Officer Frazer inquired as to who the Respondent was and what he was doing there at that hour and manner. Certainly in a major metropolitan area like Dade County during the day, the people themselves would make an inquiry or

call authority as to the Respondent's presence. Under cover of night, Officer Frazer in his lonely rounds, is the only person present to make an inquiry as to a stranger's peculiar presence or conduct. Officer Frazer said that he had never seen the Respondent before. Record-on-Appeal at 12-13. The approach of persons in the late night hours for identification purposes, is well recognized in law enforcement. See, e.g., Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). We are in this society, in residential areas, "day people." It is reasonable in the dead-of-night to ask a stranger moving slowly through the neighborhood, who he is and where he is going. If the mere contact announced in Terry v. Ohio, and articulated in Wylie, supra, is to have any meaning; then it does here and the Supreme Court of Florida's

application of the prohibitions of the Fourth and Fourteenth Amendments of the United States Constitution, is clearly erroneous. The line of decisions that the court is following in Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976) and Coladonato v. State, 348 So.2d 326 (Fla. 1977) are similarly erroneous applications of the United States Constitution.

In Coladonato v. State, supra, the court relied upon State v. Gustafson, 258 So.2d 1 (Fla. 1972), approved by this Court in Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) and Wilson v. Porter, supra, to reverse both the trial court and the Fourth District Court of Appeal. A16-A17. The facts in Coladonato, supra, were not disputed:

> "During early evening hours, [the defendant] was initially observed by a policeman driving a U-Haul Van with out-of-state plates in the business district of Boca Raton, Florida. A few minutes later, the officer saw the same vehicle and considered stopping it because "it was an unusual vehicle to be in the area at that time of night." However, the patrolman did not stop the [the defendant] at that time because he was called away on other matters. Approximately one hour later, the officer returned to the business district and spotted the U-Haul Van for a third time. At this point, he elected to stop [the defendant], although he had no reason to do so except his personal suspicion that illegal activity had been or was about to be committed.
>
> "Upon approaching the van, the officer looked through the rear window and observed articles of expensive stereo equipment. He then asked [the defendant] to supply him with some

personal identification which did. After receiving this identification, the officer returned to his vehicle, radioed headquarters to check identity and requested, in addition, a search of the local stereo stores. A few mintues later, police headquarters notified the officer that [the defendant] was wanted on a New Jersey warrant. [The defendant] was placed under arrest. Subsequent to this arrest, the officer learned that a local stereo store had been burglarized. The van was then impounded, and the stereo equipment seized pursuant to an inventory search."

A13-A15.

In Vollmer v. State, the court specifically relied upon its view of Terry v. Ohio, and Adams v. Williams, supra, to reverse the trial courts denial of the Motion to Suppress A23-A25. The facts were not disputed:

"The events in question occurred on March 1, 1975, at approximately 3:00 A.M. As Officer Alexander of Lakeland Police Department was traveling south on Florida Avenue in a marked police vehicle, he observed the appellant walking north between Edgewood and Windsor Streets on Florida. There was no evidence of any criminal activity in this area of Lakeland on that morning. The officer had no reason to believe that the appellant had committed any crime. But, as the officer drove by, he noticed the appellant watching the patrol car. He then turned his car around to further observe the appellant whereupon he stopped him and asked him for his name. When the appellant replied that his name was "Bill Hollis," the officer inquired as to whether he had any identification. When appellant answered in the negative, the officer next asked whether appellant

had a wallet. Appellant then replied, "yes," and produced a wallet. As appellant opened the wallet the off officer saw a Florida driver's license and asked to inspect it. Appellant gave it to the officer and upon inspection, the officer determined that the license bore the name "John Brian Vollmer." When Officer Alexander read that name aloud, appellant "took off running" and the officer gave chase on foot. When the officer caught appellant a struggle ensued. Appellant was arrested for resisting an officer with violence. A subsequent search of his person at the police station revealed LSD and cocaine."

A21-A23.

The Petitioner submits that under the circumstances in the case at bar and in Coladonato and Vollmer, supra, the actions of the officers were reasonable in light of the facts and circumstances known to

the officers and were not prohibited under the Fourth and Fourteenth Amendments to the United States Constitution and Terry v. Ohio and its progeny.

VII

CONCLUSION

This Court has two (2) similar cases pending before it in Michigan v. DeFillippo, U.S. S.Ct. Case No. 77-1680 and Brown v. Texas, U.S. S.Ct. Case No. 6673. Petitioner submits that the cause herein substantially presents an additional companion case to the above referenced causes which will enhance this Honorable Court's discussion and disposition of the referenced cases. The Supreme Court of Florida has imposed an erroneous rule herein under the Fourth and Fourteenth Amendments that a police officer is never authorized to contact an individual on the public street unless the police can articulate a basis for a belief that a crime had, will be, or is currently being committed. This Honorable Court should assume jurisdiction

and correct the Constitutional error herein by reinstating the decision of the Third District Court of Appeal of Florida and the trier of fact below. See, Terry v. Ohio, supra.

RESPECTFULLY SUBMITTED, at Miami, Dade County, Florida, this _____ day of _____, 1979.

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VIII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Brief of Petitioner were caused to be served by United States mail first-class delivery, upon Bennett H. Brummer, Public Defender, Counsel for Respondent, 1351 N.W. 12th Street, Miami, Florida, 33125, on this _____day of _____, 1979.

CALVIN L. FOX, Esquire
Assistant Attorney General

A P P E N D I X

Jack MULLINS, Appellant,

v.

The STATE of Florida, Appellee.

No. 77-1058

District Court of Appeal of Florida,
Third District

Dec. 13, 1977

Rehearing Denied Jan. 16, 1978.

AN APPEAL FROM THE CIRCUIT COURT FOR DADE COUNTY, FLORIDA, IRA DUBITSKY, JUDGE.

Bennett H. Brummer, Public Defender, and Thomas G. Murray, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty.Gen., and Arthur Joel Berger and Ronald A. Dion, Asst. Attys.Gen., for appellee.

Before PEARSON and NATHAN, JJ., and CHARLES CARROLL (Ret.), Associate Judge.

PER CURIAM.

The single point presented on this appeal urges that the trial court erred in denying defendant's motion to suppress evidence obtained through a claimed unreasonable search and seizure. The record shows that a police officer stopped the defendant and spoke to him upon observing the defendant riding a bicycle slowly through a residential area in the very early morning hours. It appears without controversy that while speaking to the defendant, the officer became cognizant of a strong odor of marijuana and saw a clear, plastic containing a brown substance protruding from the defendant's shirt pocket. The officer thereupon arrested the defendant and took possession of the contraband.

Defendant claims that the stop and subsequent confiscation of the contraband was illegal, relying on the principle set forth in Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976).

We hold that no unreasonable search appears in this record and that the fact that the police officer stopped the appellant to speak to him, under the circumstances of the case, was not an infringement of defendant's Fourth or Fourteenth Amendment rights. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); and Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). See also Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); and cf. U.S. v. Allen, 472 F.2d 145 (5th Cir. 1973).

Affirmed.

Jack MULLINS, Petitioner,

v.

STATE of Florida, Respondent.

No. 53394

Supreme Court of Florida.

Dec. 7, 1978.

Rehearing Denied Feb. 22, 1979.

WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, CASE NO. 77-1058

Bennett H. Brummer, Public Defender; and Thomas G. Murray, Assistant Public Defender, Miami, for Petitioner.

Robert L. Shevin, Attorney General; and Calvin L. Fox, and Ronald A. Dion, Assistant Attorneys General, Miami, for Respondent.

SUNDBERG, J.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Third District, in Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1977), which allegedly conflicts with Coladonato v. State, 348 So.2d 326 (Fla. 1977), and Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976). The issue presented is whether a policeman may stop and question a person on a bare suspicion of illegal activity. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

A police officer observed petitioner riding a bicycle slowly through a residential area in the very early morning hours. The officer stopped petitioner and asked him his name and what he was

doing in the area. During this conversation the officer became cognizant of a strong odor of marijuana and saw a clear, plastic bag containing a brown substance protruding from petitioner's shirt pocket. Petitioner was thereupon arrested and the contraband seized.

An information was filed charging petitioner with possession of cannabis. Petitioner filed a motion to suppress which was subsequently denied. On appeal the District Court of Appeal, Third District, affirmed, holding the search reasonable under the circumstances. Petitioner contends the stop and subsequent confiscation of the contraband was illegal under the authority of Coladonato v. State, supra.

We agree that our opinion in Coladonato v. State, supra, is dispositive of the issue before us. In that case a

policeman stopped a van merely because "it was an unusual vehicle to be in the area at that time of night." In holding the detention invalid, this Court adopted the language of then District Court Judge Alderman in his dissent in Coladonato v. State, 335 So.2d 317 (Fla. 4th DCA 1976):

> "While it is well established that a police officer may stop a vehicle to question its occupants on less than probable cause, e.g., Gustafson v. State, 243 So.2d 615 (Fla. App. 4th, 1971), rev. on other grounds 258 So.2d 1 (Fla. 1972), aff. 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed. 2d 456 (1973); Wilson v. Porter 361 F.2d 412 (9th Cir. 1966), it is equally well recognized that he may not do so arbitrarily or on a bare suspicion that the occupants are violating the law. Kersey v. State, 58 So.2d 155 (Fla. 1952); Gustafson v. State, supra;

State v. Ebert, 251 So.2d 38 (Fla. App. 2nd, 1971); Wilson v. Porter, supra; see, Fla. Stat. §901.151(2) (1975).

335 So.2d at 317

Petitioner's actions here were clearly insufficient to give rise to anything more than a bare suspicion of illegal activity. Bailey v. State, 319 So.2d 22 (Fla. 1975); Vollmer v. State, supra. Thus the mandate of Coladonato requires that the evidence seized as a result of the illegal stop be suppressed.

Accordingly, the petition for writ of certiorari is granted, the decision of the District Court of Appeal, Third District, is quashed, and this cause is remanded to the District Court of Appeal, Third District, with directions to remand

to the trial court for proceedings not inconsistent with the views expressed herein.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD and HATCHETT, JJ., Concur

ALDERMAN, J., Concurs specially with an opinion, with which BOYD, J., Concurs

ALDERMAN J., Concurring Specially

I concur with the majority holding that the evidence seized under the particular circumstances of this case should be suppressed because it was obtained as a result of an illegal stopping of the defendant. I recognize, however, that instances will arise where there will be legitimate contact between a police officer and a citizen, not based upon "founded suspicion" or "probable cause," which may result in the subsequent arrest

of the citizen for a crime detected by the police officer as a result of the legitimate contact. For example, a police officer in the performance of his duty may stop to assist a motorist who has a flat tire or may stop a woman bicyclist at night to warn her of the presence of a rapist in the area. If during these legitimate encounters with the motorist or the woman, the police officer observes stolen stereo equipment in the motorist's automobile or smells the odor of majijuana emanating from the woman and sees a plastic bag containing what appears to be marijuana protruding from her pocket, he may lawfully seize the evidence.

There are innumerable instances of this nature which could arise. The difference between these examples and the

present case is that the police officer in this case was not attempting to assist the defendant in any way but had stopped him on a bare suspicion that he was violating the law.

BOYD, J., Concurs

Vincent COLADONATO, Petitioner,

v.

STATE of Florida, Respondent.

No. 50183

Supreme Court of Florida.

July 14, 1977.

Philip G. Butler, Jr., Foley, Colton & Butler, West Palm Beach, for petitioner.

Robert L. Shevin, Atty.Gen. and Marsha G. Madorsky, Asst. Atty.Gen., for respondent.

SUNDBERG, Judge

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Fourth District, in Coladonato v. State, reported at 335 So.2d (Fla. 4th DCA

1976), which allegedly conflicts with Kersey v. State, 58 So.2d 155 (Fla. 1952), Richardson v. State, 291 So.2d 253 (Fla. 1st DCA 1974), and other decisions standing for the principle that a policeman may not stop a vehicle to question its occupants on a bare suspicion that the law has been violated. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(3), Florida Constitution.

During early evening hours, petitioner was initially observed by a policeman driving a U-Haul Van with out-of-state plates in the business district of Boca Raton, Florida. A few minutes later, the officer saw the same vehicle and considered stopping it because "it was an unusual vehicle to be in the area at that time of night." However, the patrolman did not stop petitioner at that time

because he was called away on other matters. Approximately one hour later, the officer returned to the business district and spotted the U-Haul Van for a third time. At this point, he elected to stop the petitioner, although he had no reason to do so except his personal suspicion that illegal activity had been or was about to be committed.

Upon approaching the van, the officer looked through the rear window and observed articles of expensive stereo equipment. He then asked petitioner to supply him with some personal identification which petitioner did. After receiving this identification, the officer returned to his vehicle, radioed headquarters to check petitioner's identity and requested, in addition, a search of the local stereo stores. A few minutes later, police head-

quarters notified the officer that petitioner was wanted on a New Jersey warrant. Petitioner was then placed under arrest. Subsequent to this arrest, the officer learned that a local stereo store had been burglarized. The van was then impounded, and the stereo equipment seized pursuant to an inventory search.

An information was filed thereafter charging the petitioner with one count of breaking and entering a building with intent to commit a felony, to wit: grand larceny, and a second count of grand larceny. Petitioner filed a motion to suppress which was subsequently denied. On appeal, Fourth District, affirmed per curiam without opinion (Alderman, J., dissenting).

We agree with petitioner that the District Court erred in affirming the trial court's order refusing to suppress the stereo equipment obtained when petitioner was detained on a policeman's bare suspicion that illegal activity was afoot. The dissenting opinion of Judge Alderman satisfactorily expresses the view of this Court. We, therefore, adopt this able dissent as the response of this Court in the instant cause. It is set forth in pertinent part below:

> While it is well established that a police officer may stop a vehicle to question its occupants on less than probable cause, e.g., Gustafson v. State, 243 So.2d 615 (Fla. App. 4th, 1971), rev. on other grounds 258 So.2d 1 (Fla. 1972), aff. 414

> U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), it is equally well recognized that he may not do so arbitrarily or on a bare suspicion that the occupants are violating the law. Kersey v. State, 58 So.2d 155 (Fla. 1952); Gustafson v. State, supra; State v. Ebert, 251 So.2d 38 (Fla.App. 2nd, 1971); Wilson v. Porter, supra; see, Fla. Stat. §901.151(2)(1975).

I cannot agree that the arresting officer's opinion that the vehicle was an unusual one to be seen in the area gave rise to the necessary "founded suspicion" in this case. I believe the facts of this case bring it more in line with those cases that have invalidated detentions,

see, e.g., Bailey v. State, 319 So.2d 22 (Fla. 1975); Thomas v. State, 297 So.2d 850 (Fla.App. 4th, 1974); State v. Rheiner, 297 So.2d 130 (Fla. App. 2nd, 1974); Richardson v. State, 291 So.2d 253 (Fla. App. 1st, 1974), than with those that have upheld them, see, e.g., Gustafson v. State, supra; State v. Ebert, supra; State v. Padilla, 235 So.2d 309 (Fla. App. 3rd, 1970); Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969); and Wilson v. Porter, supra.

Accordingly, the petition for writ of certiorari is granted, the decision of the District Court of Appeal, Fourth District, is quashed, and this cause is remanded to the District Court of Appeal, Fourth District, with instructions to remand to the trial court for proceedings

not inconsistent with the views expressed herein.

It is so ordered.

ADKINS, BOYD and KARL, JJ., concur.
OVERTON, C.J., dissents.

=

Brian John VOLLMER, Appellant,

v.

STATE of Florida, Appellee.

No. 75-1244.

District Court of Appeal of Florida,
Second District.

Sept. 29, 1976.

Rehearing Denied Oct. 25, 1976.

Jack O. Johnson, Public Defender, Steven H. Denman, Asst. Public Defender, and Robert S. Laing, Legal Intern, Bartow, for appellant.

Robert L. Shevin, Atty.Gen., Tallahassee, and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

SCHEB, Judge

Appellant was charged with resisting an officer with violence contrary to Fla.Stat. §843.01 and two counts of

possessing a controlled substance in violation of Fla.Stat. §893.13(1)(e). He pled nolo contendere, preserving his rights on appeal, and was sentenced to two years. He contends that he could not be guilty of violating Fla.Stat. §843.01, because the officer was acting illegally, and furthermore, that the controlled substance found on his person should have been suppressed because the search was unjustified. We agree and reverse.

The events in question occurred on March 1, 1975, at approximately 3:00 A.M. As Office Alexander of Lakeland Police Department was traveling south on Florida Avenue in a marked police vehicle, he observed the appellant walking north between Edgewood and Windsor Streets on Florida. There was no evidence of any

criminal activity in this area of Lakeland on that morning. The officer had no reason to believe that the appellant had committed any crime. But, as the officer drove by, he noticed the appellant watching the patrol car. He then turned his car around to further observe the appellant whereupon he stopped him and asked him for his name. When the appellant replied that his name was "Bill Hollis," the officer inquired as to whether he had any identification. When appellant answered in the negative, the officer next asked whether appellant had a wallet. Appellant then replied "yes," and produced a wallet. As appellant opened the wallet the officer saw a Florida driver's license and asked to inspect it. Appellant gave it to the officer and upon inspection, the officer determined that the license

bore the name "John Brian Vollmer." When Officer Alexander read that name aloud, appellant "took off running" and the officer gave chase on foot. When the officer caught appellant a struggle ensued. Appellant was arrested for resisting an officer with violence. A subsequent search of his person at the police station revealed LSD and cocaine. In this instance the initial stop by the officer was not justified. Without more, the fact that appellant was walking along a main public thoroughfare at 3:00 A.M. and turned to look at a police car is an insufficient basis to justify a stop under Terry v. Ohio, 1968, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, or Florida's Stop and Frisk Law, Fla.Stat. §901.151. See Thomas v. State, Fla.App. 4th 1974, 297 So.2d 850, in which our

sister court held that stopping a car at 5:00 A.M. was unjustified when the only events arousing suspicion were that the driver started to pass a police car and then pulled back, and the passenger then turned to look at the police car.

We recognize that a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Adams v. Williams, 1972, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612. And, where the public safety is endangered, identification may properly be requested. Cf., Hardie v. State, Fla. 1976, 333 So.2d 13. But here, there was no evidence of any danger to the public safety and there were

no circumstances to justify the police to suspect the appellant of being involved in any criminal activity. Cf., Maruca v. State, Fla.App.3d 1976, 329 So.2d 427.

The identification furnished the officer by appellant was the product of the stop. Since the initial stop of the appellant by the officer was illegal, the fact that appellant produced an identification contrary to the name he had given and then fled, does not validate the policeman's actions. The appellant here was not required to explain his presence and conduct. Cf., State v. Ecker, Fla. 1975, 311 So.2d 104.

In Stanley v. State, Fla.App.2d 1976, 327 So.2d 243, we held that a baggie of marijuana was improperly seized even though it had been thrown out the window

of the defendant's car, because the evidence was the fruit of an illegal stop of the car. See Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; D'Agostino v. State, Fla.1975, 310 So.2d 12.

Since the actions of the officer were unjustified, appellant could not be charged with resisting the officer under Fla.Stat. §843.01. See Burgess v. State, Fla.App.2d 1975, 313 So.2d 479, and cases cited therein. Similarly, the evidence found on appellant's person must be suppressed since the search was not justified as being incident to a lawful arrest.

Reversed.

BOARDMAN, Acting C.J., and GRIMES, J. concur.

FLORIDA

LAW ENFORCEMENT

HANDBOOK

1978

DADE COUNTY

PUBLIC SAFETY DEPARTMENT

E. WILSON PURDY
DIRECTOR

STOP AND FRISK
INVESTIGATIVE DETENTION

CHART 1

ZERO	REASONABLE SUSPICION	PROBABLE CAUSE	PROOF BEYOND A REASONABLE DOUBT

FACTS KNOWN

(Excerpts from "Investigative Detention" by John Dennis Miller, FBI Law Enforcement Bulletin Nov. 1974, December, 1974, January, 1975).

Criminal investigation is a continuing process. One conceptional view depicts a continium representing the facts concerning this specific situation. At one end are no facts; at the other, the facts add up to show proof beyond a reasonable doubt. As one scans from left to right, the evidence of guilt increases

from zero to reasonable suspicion (statutory stop), to probable cause, to proof beyond a reasonable doubt (see Chart 1).

Application of these facts to a particular person in a specific situation may be clear. If there is proof beyond a reasonable doubt, a verdict of guilty may be justified; if there is probable cause to believe a law has been violated and a particular person violated that law, full custody arrest would be lawful.

Additionally, an officer may approach a person for the purpose in engaging in a voluntary conversation in any situation, no matter what facts are known. This encounter may be termed a "contact."

CHART 2

	CONTACT	STOP	ARREST
PURPOSE	INFORMATION	INVESTIGATION: Ascertaining the "...identity of the person...and...circumstances surrounding his presence abroad which led the officer to believe... (see below)"	INCARCERATION
JUSTIFICATION	NONE to MERE SUSPICION	"CIRCUMSTANCES which reasonably indicate that such person(s) has committed, is committing, or is about to commit a violation..." of any law. F.S. 901.151	PROBABLE CAUSE that...Crime was committed ...Subject did it

CHART 2 (cond't)

DETENTION	NONE	TEMPORARY	PERMANENT...(As long as Probable Cause remains, or subject is booked).
JUSTIFIED FORCE	NONE	REASONABLE (to maintain temporary detention)	REASONABLE
ASK FOR ID?	YES	YES	YES
DEMAND ID?	NO	NO - Allow subject to produce ID to remove suspicion.	YES - Search incident to arrest.

Supreme Court, U. S.
FILED
SEP 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CASE NO. 78-1801

THE STATE OF FLORIDA,

Petitioner,

vs.

JACK MULLINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER ON JURISDICTION

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IN THE

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OCTOBER TERM, 1979

CASE NO. 78-1801

THE STATE OF FLORIDA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER ON JURISDICTION

I.

OPINIONS OF THE COURT BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978), D.Ct. Case No. 77-1058,

opinion filed December 13, 1977, rehearing denied January 16, 1978. The opinion of the Supreme Court of Florida, reversing the District Court is reported at Mullins v. State, 366 So.2d 1162 (Fla. 1979), S.Ct. Case No. 53,394, opinion filed December 7, 1978, rehearing denied February 22, 1979. Both the decision of the Supreme Court of Florida and the District Court have been appended in conformance with Supreme Court Rule 23. There are no official reports for citation of these decisions.

Attached hereto are Petitioner's Composite Exhibits "A," "B" and "C," which consist of a refiled information; Petitioner's Motion for a Stay in the Supreme Court of Florida and Order Denying Stay, respectively. The references herein to the Petitioner's Appendix designated by the symbol (A) followed by an arabic number, are references to the Petitioner's Appendix attached to its

initial brief herein, which was filed on or about June 1, 1979.

II.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial court below found that the threshhold contact between the arresting officer, Frazer and the Petitioner was "reasonable." Record-on-Appeal at 15. The sole question presented to the state courts, in the opinions previously submitted by the Petitioner at Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978) [A1-A3] and Mullins v. State, 366 So.2d 1162 (Fla. 1978), [A4-A11] was stated by the Respondent, to wit:

"WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, IN DEROGATION OF THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION."

Upon the foregoing facts, the District Court of Appeal of Florida, Third District, rejected the Respondent's contention of error, holding that:

"We hold that no unreasonable search appears in this record and that the fact that the police officer stopped the appellant to speak to him, under the circumstances of this case, was not an infringement of defendant's Fourth or Fourteenth Amendment rights. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968); and Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). See also Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); and cf. U.S. v. Allen, 472 F.2d 145 (5th Cir. 1973)."

353 So.2d, supra, at 606.

The District Court rejected the construction of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), urged by the Respondent relying upon Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976).

The Supreme Court of Florida accepted jurisdiction upon the Respondent's Petition for a Writ of Certiorari pursuant to Rule 9.030(a)(2)(A)(iii) Florida Rules of Appellate Procedure (1978), based upon the conflict between the Third District Court's opinion in Mullins v. State and

Vollmer v. State, supra, at 366 So.2d at 1162 [A5]. The Supreme Court of Florida adopted the contrary construction of Terry v. Ohio, announced in Vollmer v. State, supra. [A23-A24] and the application of the Fourth and Fourteenth Amendments of the United States Constitution in Coladonato v. State, 348 So.2d 326 (Fla. 1977) [A12-A19]. 366 So.2d at 1163 [A6]. The Florida Supreme Court reversed the Third District Court of Appeal and rejected the opinions of Justices Harlan and White to the contrary in Terry v. Ohio, 392 U.S. at pp. 32-34; holding that under the provisions of the Fourth and Fourteenth Amendments that the approach at 3:20 o'clock a.m., by the arresting officers unconstitutional, per se and that a police officer is never authorized to approach and talk to an individual on the public street unless the

police officer can articulate a basis for a belief that a crime had, will be, or is currently being committed. See, 366 So.2d at 1163 [A6-A11]. The Florida Supreme Court reversed both the trier of fact and the Florida Third District of Appeal based upon an erroneous view of the constitutional protection afforded by the Fourth and Fourteenth Amendments to the United States Constitution and has abrogated common sense and the practical exigencies of law enforcement in an urban area. See, Adams v. Williams, 407 U.S. 143, at 145-146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The Petitioner submits that application of the requirements of the Fourth and Fourteenth Amendments in Mullins v. State, 366 So.2d 1162 (Fla. 1979) [A4-A11] is clearly erroneous and follows an errant line of decisions in

Coladonato v. State, 348 So.2d 326 (Fla. 1977) [A12-A19] and Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976) [A20-A26].

The Respondent in his "Memorandum Opposing Certiorari" and in his "Reply to Petitioner's 'Response to Memorandum Opposing Certiorari,'" does not dispute the foregoing analysis, but alleges instead that the matter herein is moot inasmuch as "The State of Florida" announced a nol prosequi of the matter herein on July 9, 1979. The hearing on July 9, 1979, was conducted without notice to the Office of the Attorney General. The Assistant State Attorney who announced the nol prosequi, and the trial court were unaware of the appellate proceedings herein. The "State of Florida" has, of course, been represented by statute in this matter since the Respondent's conviction on April 14, 1977, by the Office

of the Attorney General. See, §16.01 Fla. Stat. (1975).

On August 2, 1979, the Assistant State Attorney who entered the nol prosequi, refiled the charges herein against the Respondent. See, Petitioner's Exhibit A, attached hereto. On August 17, 1979, in what it knew would be futile effort in the Supreme Court of Florida, the Petitioner sought either a stay pending review, or a thirty (30) day stay to enable the Petitioner to seek a stay in this Court. See, Petitioner's Exhibit B, attached hereto. On August 29, 1979, the Supreme Court of Florida denied the Petitioner's Motion in its entirety. Petitioner's Exhibit C, attached hereto. Nevertheless, the Respondent's claim of mootness is substantially irrelevant to the proper exercise of this Court's jurisdiction. See, Pennsylvania v.

Mims, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed. 2d 331 (1977). The Petitioner has a right to seek to uphold its conviction herein and the Respondent's claim of mootness should be rejected. Pennsylvania v. Mims, 98 S.Ct. at 332, n.3.

The Respondent also contends as his only response to jurisdiction herein that the Petitioner relies "substantially" upon Brown v. Texas, ___U.S.___, 99 S.Ct. 2637 (1979). To the contrary, the Petitioner only indicated that the cause herein substantially presents an additionally companion case to the issues presented in Michigan v. DeFillippo, ___U.S.___99 S.Ct. 2627 (1979) and Brown v. Texas, supra. The Supreme Court of Florida has imposed an erroneous rule herein under the Fourth and Fourteenth Amendments that a police officer is never authorized to contact an individual on the public street unless the

police can articulate a basis for a belief that a crime had, will be, or is currently being committed. 366 So.2d, at 1163. Under the guise of the prohibitions, Fourth Amendment to the United States Constitution, the Florida Supreme Court has erroneously abrogated the common right of a law enforcement officer to engage a citizen on a public street in voluntary conversation. See, Terry v. Ohio, 392 U.S. at pp. 26, 19 n.16; United States v. Wylie, 569 F.2d 62, at 67 (D.C.Cir. 1977); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Wigfall v. State, 323 So.2d 587 (Fla. 3d DCA 1975); People v. DeBour, 386 N.Y.S. 2d 375 (N.Y.App. 1976); see, also, Adams v. Williams, 407 U.S. at 145-146; United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), (approving United States v. Wylie, supra); Husted v. State, 370 So.2d 853, at 854 n.1 (Fla. 3d DCA 1979), (noting with approval United States v. Wylie, supra).

IV.

CONCLUSION

In the case at bar, consistent with the mandate of Terry v. Ohio, supra, there is no testimony that the Respondent did anything other than to voluntarily cooperate with the officer and voluntarily provide the requested identification. Nor is there any testimony that the Respondent expressed a desire to refuse to cooperate and go on his way. The Petitioner submits that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and Fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. There is no constitutional impact per se created by a police officer addressing questions to a person on the

street at 3:20 o'clock a.m. in a residential area. See, Terry v. Ohio; Adams v. Williams; Wilson v. Porter; Wigfall v. State, supra. The immediate foregoing conclusion is further supported by examining the recent decision in Delaware v. Prouse, ___U.S.___, 99 S.Ct. 1391, at 1401 (1979), wherein the court approved police stops of all vehicles at certain times as opposed to random stops. Consistent with Adams; Terry; Porter and Delaware v. Prouse, supra, it is undisputed in the case at bar that Officer Frazer stopped all bicyclists at 3:20 a.m. on November 29, 1976, on Opa Locka Boulevard in Hialeah, Florida. The fact of Officer Frazer's initial encounter with the Respondent was not an unreasonable invasion, per se of the Respondent's constitutional rights as the Florida Supreme Court contends.

Officer Frazer's actions without show of force or authority was the most reasonable course of action in the light of the circumstances known to him and his training and experience. See, Adams v. Williams; Wilson v. Porter, supra.

Where, as in the case at bar, the state court has clearly construed and relied upon the prohibitions of the Fourth Amendment, this Court has jurisdiction. See, Orr v. Orr, ___U.S.___, 99 S.Ct. 1102, at 1109-1111 (1979). This Honorable Court should assume jurisdiction and correct the constitutional error herein by reinstating the decision of the Third District Court of Appeal of Florida and the trier of fact below. See, Terry v. Ohio, supra.

RESPECTFULLY SUBMITTED, at Miami, Dade County, Florida, on this _____ day of September, 1979.

JIM SMITH
Attorney General

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Miami, Florida 33128

(305) 377-5441

V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Reply Brief of Petitioner were caused to be served by United States mail first-class delivery, upon Bennett H. Brummer, Public Defender, Counsel for Respondent, 1351 N.W. 12th Street, Miami, Florida, 33125, on this ____day of September, 1979.

CALVIN L. FOX, Esquire
Assistant Attorney General

PETITIONER'S EXHIBITS

IN THE CIRCUIT COU OF THE ELEVENTH JUDICIAL . .RCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

SPRING Term, 19 79

AUG 3 '79 76-10226
RICHARD P. BRINKER
CLERK

THE STATE OF FLORIDA,
vs.
JACK BENTLEY MULLINS

INFORMATION FOR
UNLAWFUL POSSESSION OF CANNABIS
893.13 Fel.

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

I, NEIL KARADBIL, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, on the authority of JANET RENO, State Attorney, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that

JACK BENTLEY MULLINS

on the 29th day of November, 19 76, in the County and State aforesaid, did unlawfully and feloniously have in his actual or constructive possession a controlled substance, to-wit: CANNABIS, meaning all parts of the plant Cannabis Sativa, including all varieties thereof, whether growing or not; the seeds thereof, the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in an amount greater than five (5) grams, in violation of 893.13 Florida Statutes,

STATE OF FLORIDA }
COUNTY OF DADE } SS.

I HEREBY CERTIFY that this instrument is a true and correct copy as shown by files and records in my office. WITNESS MY HAND and official seal this
AUG 17 1979
RICHARD P. BRINKER
Clerk Circuit Court
By Susan Tippe D.C.

NK:nla
8-1-79
REFILE 76-10226
J/Stettin

Petitioner's Exhibit A

201.01-05

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, NEIL KARADBIL, Assistant State Attorney for the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that this prosecution is instituted in good faith and certifies that the State Attorney of the Eleventh Judicial Circuit of Florida has received testimony under oath from the material witness or witnesses for the offense, and the allegations as set forth in the foregoing Information, if true, would constitute the offense therein charged.

Assistant State Attorney

Assistant State Attorney
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 2 day of August, 19 79

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

Richard P. Brinker, Clerk
Circuit Court of the Eleventh
Judicial Circuit of Florida, in
and for Dade County

By Thomas V. Campbell D.C.

CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

THE STATE OF FLORIDA
vs.
JACK BENTLEY MULLINS

INFORMATION FOR
UNLAWFUL POSSESSION OF CANNABIS

IN THE SUPREME COURT OF FLORIDA

CASE NO. 53,394

JACK MULLINS, :
Petitioner, :
vs. : MOTION TO WITHDRAW MANDATE
THE STATE OF FLORIDA, :
Respondent. :

COMES NOW, the Respondent, THE STATE OF FLORIDA, by and through its undersigned counsel and moves this Honorable Court to withdraw and stay the mandate of this Honorable Court and as grounds therefore shows:

1. That on June 1, 1979, the State of Florida filed its application for a Writ of Certiorari in the United States Supreme Court with respect to the above referenced case.

2. That on July 27, 1979, the United States Supreme Court, having made a preliminary determination that there is jurisdiction, issued its order requiring the Petitioner, Jack Mullins, to reply to the Respondent's Petition for a Writ of Certiorari. See, Respondent's Exhibit A.

3. That the Petitioner has sought to have the matter herein discharged predicated upon the Mandate of this Honorable Court. See, Respondent's Exhibit B.

4. That on August 2, 1979, the State Attorney refiled the information against the Petitioner in this matter. Exhibit C.

5. That there is a substantial likelihood that the jurisdiction will be accepted by the Supreme Court of the United

Petitioner's Exhibit B

States and there is a substantial likelihood that the Respondent will be successful on the merits. The likelihood of harm to the right of the Respondent to uphold its conviction is great because there are no remedial aspects to this matter, if in fact, the cause herein is discharged as moot. See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see, also, Mullins v. State, 353 So.2d 605 (Fla. 3d DCA 1978), (citing Terry v. Ohio, supra).

WHEREFORE, the Respondent, THE STATE OF FLORIDA, respectfully requests that this Honorable Court grant a Stay Pending Review in the United States Supreme Court, or in the alternative, that this Honorable Court Stay its Mandate for a period of thirty (30) days in order that the Respondent may seek a Stay Pending Review in the United States Supreme Court.

RESPECTFULLY SUBMITTED, on this 17th day of August, 1979, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
Suite 820
401 N.W. 2nd Avenue
Miami, Florida 33128

(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Withdraw Mandate, was caused to be mailed to Thomas G. Murray, Esquire, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida, 33125, on this 17th day of August, 1979.

CALVIN L. FOX, Esquire
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 29, 1979

JACK MULLINS,	**	
Petitioner,	**	
v.	**	CASE NO. 53,394
STATE OF FLORIDA,	**	
Respondent.	**	

** ** ** ** ** ** ** ** ** **

Upon consideration of Respondent's Motion to withdraw mandate, said Motion is hereby denied.

I.

DOCKETED Attorney General

RECEIVED
SEP 7 1979
ATTORNEY GENERAL
MIAMI OFFICE

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

H
cc: Calvin L. Fox, Esquire
Thomas G. Murray, Esquire

Petitioner's Exhibit C